



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1994

Mr. Robert L. Dillard, III  
Nichols, Jackson, Dillard, Hager & Smith  
1800 Lincoln Plaza  
500 North Lincoln Akard  
Dallas, Texas 75201

OR94-631

Dear Mr. Dillard:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28325.

The City of Forney (the "city"), which you represent, has received a request for information relating to the city council's investigation of the city police department. Specifically, the requestor seeks "all . . . pertinent information, verbal reports, written reports, or any other information made available to or discussed by the council," from May 31, 1994, through August 2, 1994, including:

- a) A copy of all executive session tapes with any member of the police department, any city employee, any council member, the City Attorney, or any representative of Parker-Jones concerning the Forney Police Department, Rick Barnes, Alan Richman, or Les Willie. . . .
- b) Copies of any information or documents supplied by or supplied to any member of the Forney Police Department, any city employee, any city council member, the City Attorney, or any representative of Parker-Jones concerning the Forney Police Department, Rick Barnes, Alan Richman, or Les Willie.

- c) Copies of any reports, interviews, or any other information that has been obtained by Parker-Jones or the City Attorney concerning the Forney Police Department, Rick Barnes, Alan Richman, or Les Willie.
- d) A copy of any contract, letter of agreement, or letter between the City of Forney and Parker-Jones which details the specific items to be investigated and any breakdown of costs.<sup>1</sup>

You have submitted some of the requested information to us for review.<sup>2</sup> You claim that sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.111 of the Government Code except it from required public disclosure.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the privacy interests of third parties. You also assert section 552.102, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications and performance of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training; names and addresses of former employers; dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job performance or ability; and birth dates, height, weight, marital status, and social security numbers. *See* Open Records Decision No. 455 (1987); *see also* Open Records Decision Nos. 470, 467 (1987); 444 (1986); 421 (1984); 405 (1983).

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<sup>1</sup>The requestor expressly excludes from the scope of his request "any legal advice the City Attorney has given to the city council."

<sup>2</sup>You have not submitted for our review any copies of executive session tapes. We note, however, that based on the provisions now codified as sections 551.104 and 551.146 of the Government Code, this office has concluded that the tape or certified agenda of an executive session are not subject to disclosure under the Open Records Act, Attorney General Opinion JM-995 (1988), and in fact, may not even be reviewed by the Attorney General pursuant to the Open Records Act, Open Records Decision No. 495 (1988).

*But see* Open Records Decision No. 622 (1994) (regarding the availability of social security numbers under federal law).

We have examined the information submitted to us for review. We conclude that some of it is intimate or embarrassing, *i.e.*, information concerning city police officers' on-duty sexual conduct. However, some of this information is of legitimate public concern and, thus, may not be withheld under section 552.101 of the Government Code. *See* Open Records Decision No. 470 (1987) at 4 (concluding that a public employee's job performance does not generally constitute private affairs). On the other hand, some of this information is not of legitimate public interest and, thus, must be withheld under section 552.101. We have marked the information that the city must withhold under sections 552.101 and 552.102 of the Government Code.<sup>3</sup>

Next, we address your assertion that section 552.103 of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts from disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine

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<sup>3</sup>You also assert section 552.101 with respect to information obtained from third parties in conjunction with an "understanding that any information disclosed would be held confidential." We note, however, that information is not confidential under section 552.101 merely because the party submitting it anticipates or requests that it be kept confidential. *Open Records Decision Nos. 479 (1987); 180 (1977).* Furthermore, a governmental body cannot make information confidential under section 552.101 simply by agreeing to keep it confidential without specific statutory authority to do so. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-77 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); *Open Records Decision No. 444 (1986) at 6.*

whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5; 511 (1988) at 3.

You claim that litigation is "pending or threatened." You have not explained, however, nor have you submitted any documents, for example pleadings or letters threatening litigation, which support your assertion that litigation is pending or reasonably anticipated. While some of the submitted documents indicate that disciplined city employees have retained an attorney to represent their interests, these documents do not show that litigation has been instituted or threatened. We note that the governmental body claiming an exception is responsible for submitting in writing the reasons it believes the requested information is excepted from disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is made confidential under the Open Records Act. See Attorney General Opinion JM-672 (1987). In this instance, you have failed to demonstrate the applicability of section 552.103(a). Accordingly, the city may not withhold the requested information under that exception.

You also seek to withhold some of the requested information under section 552.107(1) of the Government Code. Section 552.107(1) excepts information from disclosure if:

- (1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. See Open Records Decision No. 574 (1990). The application of section 552.107(1) must be determined on a case-by-case basis. Open Records Decision No. 589 (1991) at 1.

We have examined the information submitted to us for review. We conclude that it does not contain any information that reveals client confidences to an attorney or an attorney's legal advice. Accordingly, the city may not withhold the requested information under section 552.107(1) of the Government Code.

Next, we address your contention that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts from disclosure the following information:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . .

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . .

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, the agency claiming "law enforcement" exception it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

You claim that the submitted information "involve[s] the investigation and potential prosecution of crime," but you do not elaborate. Some of the submitted information, for example, a memorandum from the mayor to the city council, does not appear to be a "record of a law enforcement agency or prosecutor." We believe that your bald assertion of section 552.108, without more, is not a sufficient explanation of how section 552.108 applies to the requested information. *See Attorney General Opinion JM-672* (1987); Open Records Decision No. 419 (1984) (stating rule that general claim that exception applies to entire report, when exception clearly not applicable to all information in report, does not comply with Open Records Act's procedural requirements). We conclude that, in this instance, you have failed to demonstrate the applicability of section 552.108. Accordingly, the city may not withhold the requested information under that exception.

Finally, we address your claim that the requested information is excepted from required public disclosure by section 552.111 of the Government Code, which excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and held that it excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters. Open Records Decision No. 615 at 5-6. Because the information submitted to us for review relates to an internal administrative and personnel matter, we conclude that section 552.111 does not except it from required public disclosure. Except for the information

that we have marked as protected under sections 552.101 and 552.102 of the Government Code, the city must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,

A handwritten signature in black ink that reads "Margaret A. Roll". The signature is written in a cursive style with a large, stylized "M" and "R".

Margaret A. Roll  
Assistant Attorney General  
Open Government Section

MAR/GCK/rho

Ref.: ID# 28325

Enclosures: Marked documents

cc: Mr. Marvin W. Prestridge, III  
423 Heritage Hill Drive  
Forney, Texas 75126  
(w/o enclosures)